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IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1966**

No. ~~1185~~ 72

CARL SIMON, ROBERT KAISER and MELVIN FISHMAN,

*Petitioners,*

*v.*

IRVING L. WHARTON, as Trustee in Proceedings for the Reorganization of Continental Vending Machine Corp. and Continental Apco. Inc.,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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March 23, 1967

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No.

CARL SIMON, ROBERT KAISER and MELVIN FISHMAN,

*Petitioners,*

*v.*

IRVING L. WHARTON, as Trustee in Proceedings for the Reorganization of Continental Vending Machine Corp. and Continental Apco. Inc.,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on March 3, 1967.

### Citation to Opinions Below

The opinion of the District Court granting an injunction to petitioners (120a)* is printed in Appendix C hereto and

* The appendix method of appeal was used in the Court of Appeals and pursuant to Rule 21(3) of this Court the appendices of the parties were filed in this Court. References to Respondent's Appendix (Appellant below) are designated by "a". References to Petitioner's Appendix are designated by "b". References to additional portions of the Record and to the proceedings in the Court of Appeals filed with this Court are preceded by "R."

is reported at 262 F. Supp. 64. The majority and dissenting opinions in the Court of Appeals, which reversed the judgment of the District Court, are printed in Appendix A hereto and are not yet reported.

## Jurisdiction

The judgment of the Court of Appeals, printed in Appendix B hereto, was entered March 3, 1967. The mandate of the Court of Appeals was stayed pending proceedings in this Court by order of Mr. Justice Harlan dated March 13, 1967 following the Court of Appeals' denial of a stay on March 9, 1967. The 90-day injunction of the District Court, which expired on March 17, 1967, was continued, by an opinion and order of that Court dated March 17, 1967, until final disposition of this matter by this Court (Appendix D).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## The Question Presented

This petition presents the question whether a federal criminal court may act to insure a fair criminal trial by enjoining the depositions of the defendants in the criminal case in related private civil litigation pending in another federal district.

The District Court (Judge Frederick vP. Bryan) issued such an injunction here in the following circumstances: Both the indictment in the Southern District of New York and the complaint in the civil action pending in the Eastern District of New York charged fraud with respect to a number of the same transactions. The subject matter of the indictment and of the civil complaint are, in the main, the same. The Assistant United States Attorney in charge

of the criminal case relied extensively in the presentation of the case to the Grand Jury upon materials yielded by discovery proceedings in the civil case, he has been in personal contact with the attorneys for respondent (the plaintiff in the civil case) and deposition transcripts from the civil case have been made available to him. If the depositions were taken, the prosecution would have available to it in advance of trial the whole of the defense case, a significant advantage which it could not otherwise obtain.

The District Court in the criminal case enjoined the civil depositions upon the findings that petitioners

> "• • • will suffer substantial and irreparable prejudice in their defense of the criminal charges against them if the [respondent] Trustee continues to take their depositions at this time and that it is reasonably likely that such unfairness will result as threatens the integrity of these criminal proceedings." (C22)

To the District Court, "the controlling consideration" was

> "• • • the protection of the paramount public interest in assuring the essential fairness of criminal proceedings under the Rules of Procedure laid down for their conduct." (C16)

The District Court concluded that

> "The practical effect of denying injunctive relief against the taking of the depositions of the three criminal defendants at this time is likely to permit the prosecution to have full disclosure in contravention of the protections given defendants by the Rules of Civil Procedure." (C15)

The District Court concluded further that in balancing the probable prejudice to petitioners in their defense of

the criminal case against reasonable and judicially controlled delay in the taking of three depositions in a protracted civil case, the "scales are tipped overwhelmingly" in petitioners' favor.

On appeal to the Court of Appeals for the Second Circuit, the injunction was reversed, with Circuit Judge Feinberg dissenting. The Court of Appeals majority (Chief Judge Lumbard and Circuit Judge Smith) held that issuance of the injunction was error because any imbalance of pre-trial disclosure in the criminal case was "merely the natural by-product of another judicial proceeding" (A7). Such an injunction could issue, the Court of Appeals held, only upon a showing that the civil case depositions "would interfere with the trial of the indictment or the preparation of their [petitioners'] defense in that trial" (A3); petitioners' only remedy against unfair imbalance in pre-trial disclosure was to refuse to testify in the civil case on self-incrimination grounds. To the Court of Appeals majority, the controlling consideration appeared to be "the public interest in the progress of the Eastern District [civil] action" (A7).

In dissent, Circuit Judge Feinberg wrote that he would have affirmed on the basis of Judge Bryan's opinion, that without an injunction, "the criminal trial of these defendants will be fundamentally unfair" and that "the reversal is totally uncalled for" because its continuance should have been left to the discretion of the District Court (A11).

## Constitutional Provisions, Statutes and Rules Involved

The constitutional provision involved is the due process clause of the fifth amendment to the United States Con-

stitution. The statute giving the District Court power to issue the injunction is 28 U.S.S. §1651(a). The rules giving the District Court discretion to enter the injunction are Rules 2 and 57(b) of the Federal Rules of Criminal Procedure. These provisions are printed in Appendix E, *infra*.

## Statement

Petitioners Simon and Kaiser are partners and petitioner Fishman is a senior professional associate of the national independent accounting firm of Lybrand, Ross Bros. & Montgomery ("Lybrand"). All three have been indicted in the United States District Court for the Southern District of New York upon charges of conspiracy to file false financial statements with the Securities and Exchange Commission and of mail fraud in connection with the financial statements of Continental Vending Machine Corp. ("Continental"), a client of the Lybrand firm. The Lybrand firm is not indicted but is named as a co-conspirator (75a). The indictment was filed October 17, 1966, and the defendants have pleaded not guilty.

### A. The civil action in the Eastern District of New York.

Fifteen months before the indictment, Continental's Chapter X trustee, Respondent Wharton, brought a civil action against the Lybrand firm in the United States District Court for the Eastern District of New York, claiming damages for alleged fraud and conspiracy in connection with the same Continental financial statements alleged in the indictment as well as in connection with

earlier ones. Petitioners are not named as defendants in the civil action.

In September 1965, the trustee began taking the oral deposition of petitioner Simon as a witness. Although Simon testified for 16 days and the transcript runs to 1,800 pages, his direct examination has not been completed (122a). Before the indictment, the trustee also took the deposition of several other Lybrand partners and associates (108a-110a, 3b-6b).

**B. The Kaiser deposition.**

In October 1966, just a few days before the indictment, counsel for Lybrand and counsel for respondent agreed that the deposition of petitioner Kaiser would commence on October 20 (108a-110, 3b). When the indictment was filed on October 17, counsel for Lybrand and Kaiser's personal counsel sought unsuccessfully an adjournment of the deposition so that the situation could be reconsidered, and in particular so that Kaiser could retain and consult with counsel for the criminal case.

Unable to arrange an adjournment, Kaiser's counsel was compelled to move on October 21 in the civil case for a protective order under Rule 30(b) of the Federal Rules of Civil Procedure to prevent the deposition upon the ground that Kaiser's appearance at a deposition at that time would violate his right against self-incrimination and would be oppressive (1a). Kaiser was the sole moving party. The motion was denied by Judge Jacob Mishler* of the

* The Chapter X proceedings involving Continental and a subsidiary corporation have been assigned to Judge Jacob Mishler for all purposes under Rule 2 of the General Rules of the Eastern District. Similarly, the civil suit brought by the Chapter X trustee against Lybrand has been assigned to Judge Mishler for all purposes.

Eastern District on the ground that Kaiser was required to appear and assert his privilege against self-incrimination if he chose not to testify (45a). Kaiser appealed to the Court of Appeals, but the appeal was dismissed summarily without opinion on October 26, 1966, presumably because the order was not appealable (59a). Kaiser was ordered to appear for his deposition on October 26 and on that date Kaiser and his counsel moved before Judge Mishler for a week's adjournment of the deposition so that Kaiser could retain trial counsel for the criminal case and consult with him with respect to the deposition. The motion was denied from the bench and the deposition began (R4-R17). On October 31 Kaiser again testified and further deposition dates were fixed for November 2 and 4.

**C. The motion for an injunction in the Southern District of New York.**

On October 27, petitioner Kaiser, together with petitioners Simon and Fishman, retained counsel for the criminal case, who moved on November 1 in the Criminal Motion Part in the Southern District of New York on behalf of all three defendants for an injunction against respondent to prevent him from continuing the civil case against Lybrand until the completion of the criminal case on the grounds that the continued depositions would provide discovery to the Government not otherwise available to it and that the depositions would be burdensome (90a). On December 12, 1966, Judge Bryan granted the motion in part, holding that the taking of petitioners' depositions should be enjoined for 90 days, after which the injunction could be continued upon application by petitioners for good cause shown. The injunction was entered December 16, 1966; it expired by its own terms on March 17, 1967 (145a).

**D. The decision of the Court of Appeals and continuance of the injunction by the District Court.**

The Court of Appeals reversed the injunction on March 3, 1967, with Circuit Judge Feinberg dissenting (Appendix A). The judgment of the Court of Appeals directed that its mandate issue forthwith.

After moving unsuccessfully in the Court of Appeals for stay of the mandate, petitioners applied to Mr. Justice Harlan for stay of the mandate and for continuance by this Court of the District Court injunction pending review in this Court. Mr. Justice Harlan, by order and memorandum opinion of March 13, 1967, stayed the Court of Appeals mandate but denied, without prejudice to prompt application in the District Court, petitioners' motion for continuance of the injunction. Thereafter, petitioners moved in the District Court for continuance of the injunction and that motion was granted on March 17, 1967 (Appendix D). The District Court found that the civil case was "by no means ready for trial" (D5) and concluded that

> "• • • if the injunction order expiring on March 17, 1967 is not continued in effect for at least a limited period such unfairness in the criminal trial is likely to result as to require the continued intervention of the criminal court to ensure the fair administration of criminal justice and the rules governing it." (D7)

Accordingly, the injunction remains in effect pending review in this Court.

**E. The relevant facts.**

The indictment and the civil complaint both concern the financial statements of Continental, a publicly-held company whose securities were listed on the American

Stock Exchange. Continental was a client of the Lybrand firm and the defendants' connection with the allegedly false financial statements was as independent public accountants. The function with respect to which they stand accused was to examine, in accordance with generally accepted auditing standards, and to express an opinion upon the financial statements of their client.

The facts which are relevant at this stage of the proceedings are few and undisputed:

(1) The transactions on which the civil claims are stated form the basis of the criminal charges (45a, 128a, compare 75a with R267).

(2) The deposition testimony so far given by petitioners Simon and Kaiser related to the matters alleged in the indictment. Both were questioned and both testified with respect to factual matters as well as to their views of prevailing auditing standards and accounting principles (7b, 10b, R1-247).

(3) The prosecution has continuously received from respondent's attorneys deposition transcripts and documents produced in the civil action (117a, 130a, 9b-10b). The prosecution asserts its right to continue to do so (116a-118a).

(4) If the depositions continue, the prosecution may discover in advance of trial the whole defense case—an advantage which the prosecution itself could not obtain directly under the Federal Rules of Criminal Procedure.

(5) If the depositions continue, the prosecution would gain a substantial advantage over the defendants.

(6) The District Court found, both before and after decision in the Court of Appeals, that any inconvenience and delay to respondent was overwhelmingly outweighed by the probability of substantial prejudice to petitioners if the depositions continued.

## Reasons For Granting The Writ

This petition presents a substantial and important question concerning the administration of criminal justice in the federal courts. That question arises out of the strikingly different policies underlying pre-trial disclosure in civil and criminal cases. This case poses the question whether and how those different policies should be adjusted or harmonized when they collide in concurrent civil and criminal litigation. In this Court, the question is one of first impression.

### I

The district courts deal frequently with questions concerning the control of discovery in concurrent civil and criminal litigation in order to avoid prejudice either to the prosecution or to the defense in the criminal case. The reported decisions in the district courts hold that civil discovery should not ordinarily go forward against the prosecution or against a defendant in a criminal case when both cases involve the same issues.*

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* *Campbell* v. *Eastland*, 307 F. 2d 478 (5th Cir. 1962), *cert. denied*, 371 U. S. 955 (1963); *United States* v. *$2,437.00 United States Currency*, 36 F.R.D. 257 (E.D.N.Y. 1964); *United States* v. *Steffes*, 35 F.R.D. 24 (D. Mont. 1964); *United States* v. *Maine Lobstermen's Ass'n*, 22 F.R.D. 199 (D. Me. 1958); *United States* v. *Linen Supply Institute of Greater New York*, 18 F.R.D. 452 (S.D.N.Y. 1955); *United States* v. *Bridges*, 86 F. Supp. 931 (N.D. Cal. 1949); *United States* v. *A. B. Dick Co.*, 7 F.R.D. 442 (N.D. Ohio 1947); *Zara Contracting Co.* v. *New York*, 22 App. Div. 2d 415, 256 N.Y.S. 2d 98 (3rd Dep't 1965); *Perry* v. *McGuire*, 36 F.R.D. 272 (S.D.N.Y. 1964); *Paul Harrigan & Sons, Inc.* v. *Enterprise Animal Oil Co., Inc.*, 14 F.R.D. 333 (E.D. Pa. 1953); *National Discount Corp.* v. *Holzbaugh*, 13 F.R.D. 236 (E.D. Mich. 1952); *Cf. United States* v. *Parrott*, 248 F. Supp. 196 (D.D.C. 1965); but see *Hiss* v. *Chambers*, 8 F.R.D. 480 (D. Md. 1948)

The opinion of the Court of Appeals majority in the present case is the first to suggest that while the Government may invoke the authority of the trial court to avoid disclosure of its case when it brings concurrent civil and criminal suits, a person accused of crime must yield discovery of his entire case to the prosecution except to the extent that he invokes his fifth amendment privilege against self-incrimination.

Fundamental as may be the fifth amendment's provision that no man shall be compelled to give testimony against himself, it is not the office of that historic provision to adjust and harmonize the different policies underlying pre-trial disclosure in civil and criminal litigation. The fifth amendment is not the full measure of a man's right to a criminal trial which is fundamentally fair and it hardly comports with civilized standards of fairness to say that since pre-trial disclosure to the prosecution of the entire defense case is a "natural by-product of another judicial proceeding" (A8), a defendant's only remedy is his right against self-incrimination.

The remedy proffered by the Court of Appeals majority is not in the circumstances of this case any remedy at all, for petitioners would lose almost as much by refusal to testify on self-incrimination grounds as by conviction in the criminal case. We recognize that in law no stigma attaches to assertion of fifth amendment rights. Perhaps in the perfect society there would be no stigma of any kind. But we know as a matter of common sense that professional men associated with a distinguished firm of independent public accountants would end their careers by refusal to testify in order to avoid self-incrimination.

Moreover, the Court of Appeals majority indicated complete misapprehension of the nature of a witness' fifth amendment rights when it suggested that peti-

tioners could predicate refusal to testify in the civil case "on advice of counsel in order to prevent pretrial disclosure of their factual contentions" (A8). The avoidance of pretrial disclosure is not a legitimate fifth amendment ground for refusal to testify. The fifth amendment is concerned not with pretrial disclosure, but only with testimony which may tend to incriminate. *Hoffman* v. *United States,* 341 U. S. 479, 486 (1951); *United States* v. *Costello,* 222 F. 2d 656, 661 (2d Cir.), *cert. denied,* 350 U. S. 847 (1955).

The emphasis of the Court of Appeals majority upon the right against self-incrimination creates a dubious standard for the district courts. Since that standard relates to the fair administration of criminal justice and to questions which frequently arise in concurrent civil and criminal litigation, it is appropriate for this Court to enunciate the principles which are to govern for the future.

## II

Only one other Court of Appeals has dealt with the question of controlling discovery in concurrent civil and criminal litigation. In *Campbell* v. *Eastland,* 307 F. 2d 478 (5th Cir. 1962), *cert. denied,* 371 U. S. 955 (1963), the Fifth Circuit stated the controlling considerations:

> "In handling motions for a stay of a civil suit until the disposition of a criminal prosecution on related matters and in ruling on motions under the civil discovery procedures, a judge should be sensitive to the difference in the rules of discovery in civil and criminal cases. While the Federal Rules of Civil Procedure have provided a well-stocked battery of discovery procedures, the rules governing criminal discovery are far more restric-

> tive * * *. Separate policies and objectives support these different rules.
>
> "* * * Judicial discretion and procedural flexibility should be utilized to harmonize the conflicting rules and to prevent the rules and policies applicable to one suit from doing violence to those pertaining to the other. * * *"

While the Fifth Circuit did not have before it an injunction issued by the District Court, its view of the governing principles cannot be reconciled with the reasoning of the Court of Appeals. The Second Circuit stated here that "we decline to follow" the consistent line of cases which reflect the *Campbell* holding, and held instead that a defendant's remedy was to assert his fifth amendment privilege (A10).

## III

The Court of Appeals said that because injunctions such as the one issued here "are fraught with possibilities of conflict between courts" (A9), it would be more appropriate to repose control of discovery in that court in which the civil case is pending. But where the interest involved is the right of an accused to a fair criminal trial, the federal courts have never shirked an appropriate remedy because it was "fraught with possibilities of conflict between courts".

Moreover, it is the court in which the criminal case is pending which bears the responsibility of affording a fair criminal trial. In the civil action, a defendant's remedy would be limited to a motion for a protective order under Rule 30(b) of the Federal Rules of Civil Procedure. Petitioner Kaiser, the only one of the three petitioners whose deposition was scheduled subsequent to indictment, made such a motion in the civil case here, but upon denial of that motion his appeal to the Court of Appeals was dis-

missed. Since the decision on a motion made under Rule 30(b) of the Civil Rules is not appealable, the Court of Appeals majority would leave to resolution by unappealable order important questions relating to the fair administration of criminal justice. In any event, the appropriateness of a motion for a protective order in the civil case should not preclude an injunction by the criminal court when necessary to ensure a fair criminal trial.

The circumstance that district court decisions involving control of discovery in concurrent civil and criminal litigation are nearly always rendered in a form which is not appealable underscores the appropriateness of granting certiorari here—where the question is presented by appealable order—in order to give guidance in an area of significant concern.

## IV

Due process requires fundamental fairness, *In re Murchison*, 349 U. S. 133 (1955), and this Court has charged the district courts to preserve the fair application of the Criminal Rules. *McNabb* v. *United States*, 318 U. S. 332 (1943). This Court recently held in *Estes* v. *Texas*, 381 U. S. 532 (1965), that where the probability of prejudice to the accused is inherent in the circumstances, it is not necessary to find identifiable prejudice in order to conclude that due process is wanting.

The District Court here canvassed all of the relevant considerations, weighed the prejudice to respondent by some delay in the taking of three depositions in a civil case against the probability of substantial prejudice to petitioners in the criminal case, concluded that the scales weighed overwhelmingly in petitioners' favor and issued an injunction because,

> "Having found that it is reasonably probable that if these depositions are taken now essential unfair-

> ness will result which will threaten the integrity of the criminal proceedings, this court may not shirk its duty to protect the criminal process before it from that probability."

The District Court thus bottomed its injunction upon the kind of fundamental unfairness envisioned by Chief Justice Taft in *Tumey* v. *Ohio*, 273 U. S. 510, 532 (1927):

> "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law."

Judge Bryan's decision is unassailable in its logic, enlightened and yet coldly practical in its approach to the fair administration of criminal justice. We submit that the standards he applied are those which should govern generally in the federal courts in cases of concurrent civil and criminal litigation. Since those standards were repudiated by the Court of Appeals in one of the only two appellate decisions which deal with the question, we submit that this Court should in the exercise of its supervisory powers over the federal district courts grant certiorari to settle an important question in the administration of criminal justice.

## CONCLUSION

**The petition for certiorari should be granted.**

Respectfully submitted,

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March 23, 1967

## APPENDIX A

## Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 337—September Term, 1966

Argued February 7, 1967 Decided March 3, 1967

Docket No. 31012

---

UNITED STATES OF AMERICA,

*Plaintiff,*

*v.*

CARL SIMON, ROBERT KAISER and MELVIN FISHMAN,

*Defendants-Appellees,*

and

HAROLD ROTH,

*Defendant.*

IRVING L. WHARTON,

*Appellant.*

---

Before Lumbard, Chief Judge, Smith and Feinberg, Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Frederick van Pelt Bryan, J. 262 F. Supp. 64, enjoining the plaintiff in an action pending in the Eastern District of New York for a period of ninety days from taking the deposi-

tions of three defendants named in an indictment pending in the Southern District of New York.

Reversed.

Marvin Schwartz, New York, N. Y., (Thomas E. Patton, Sullivan & Cromwell, New York, N. Y., on the brief) for defendants-appellees.

Joseph J. Marcheso, New York, N. Y., (Robert Giordano, Christy, Bauman, Frey & Christy, New York, N. Y., on the brief) for appellant.

Lumbard, Chief Judge.

The question on this appeal is whether there is sufficient basis for an order entered by Judge Bryan in the Southern District of New York on December 16, 1966, enjoining Irving L. Wharton, trustee in the bankruptcy receivership of Continental Vending Machine Corporation in the Eastern District of New York, for a period of ninety days from taking the depositions in an action pending in the Eastern District since July 1965 of the three defendant-appellees, who are named in an indictment filed in the Southern District on October 17, 1966, which involves in part the same facts as the Eastern District action.

Judge Mishler, the Rule 2 judge in the Eastern District action,[1] had on October 24, 1966 denied an application

1. General Rule 2(b) of the Eastern District provides in part: "The chief judge with the approval of his associate judges, upon his own motion or the motion of any party, may assign a long and complicated case to a judge for all purposes including the following: (1) to hear all motions and preliminary applications; (2) to conduct the pre-trial conference; and (3) to preside at the trial of the action."

made by the defendant-appellee Kaiser after the indictment was filed for a protective order under Fed. R. Civ. P. 30(b), staying his deposition on the ground that it was oppressive and violated his Fifth Amendment privilege against self-incrimination. Judge Mishler observed that Kaiser could assert his privilege in response to specific questions at the deposition. None of the appellees has invoked the privilege against self-incrimination at any point.

Although the indictment was returned in October 1966, no date has been set for the criminal trial in the Southern District. As appellees have made no showing that the taking of the depositions would interfere with the trial of the indictment or with the preparation of their defense in that trial, we reverse Judge Bryan's order.

It is conceded that the trustee is diligently pressing forward the preparation of the Eastern District action for trial, that he is seeking in good faith to take appellees' depositions for purposes of that action, and that the depositions are essential to his preparation for trial. An involuntary petition for the reorganization of Continental Vending Machine Corporation under Chapter X of the Bankruptcy Act was granted by Judge Mishler in July 1963, and Irving L. Wharton was appointed and qualified as trustee.[2] On July 1, 1965, the trustee commenced a civil action in the Eastern District against the accounting firm of Lybrand, Ross Bros. & Montgomery, Harold Roth,

2. John P. Campbell, who had been appointed conservator of Continental's assets on complaint of the Securities and Exchange Commission by Judge Bonsal in the Southern District in April 1963, was appointed co-trustee with Wharton. Since Campbell's resignation in September 1964, Wharton has acted as sole trustee.

the former president of Continental, and the Meadowbrook National Bank, seeking damages for an alleged conspiracy to despoil Continental's assets and to conceal the despoliation by means including the certification of false financial statements by Lybrand for the audit years 1958 through 1962, and for alleged negligence and recklessness of Lybrand and others in permitting the alleged despoliation. This action was consolidated with one brought in September 1964 against Roth, various officers and directors of Continental, and others (but not against Lybrand, pending settlement talks which later failed), and the consolidated actions were assigned to Judge Mishler as the Rule 2 Judge for all purposes.

The trustee has expended substantial sums for legal and accounting fees in the discovery proceedings against Lybrand, which began shortly after July 1965. All Lybrand's books and records relating to the audit years in question have been made available to the trustee, and Lybrand personnel have been deposed, including the appellee Simon, the Lybrand partner in charge of the Continental engagement from 1960 to 1963, whose deposition is still open. The deposition of the appellee Kaiser, another Lybrand partner connected with the Continental engagement, had been scheduled to begin October 20, 1966 when the Southern District indictment was returned on October 17, 1966.

The indictment charged Roth and the appellee Simon, Kaiser, and Fishman in six counts with mail fraud, 62 Stat. 763 (1948), as amended, 18 U.S.C. § 1341, and conspiracy to commit mail fraud and to file a willfully false and misleading report with the Securities and Exchange Com-

mission in violation of 48 Stat. 904 (1934), as amended, 15 U.S.C. § 78ff, 62 Stat. 749 (1948), 18 U.S.C. § 1001, by certifying, mailing, and filing a materially false and misleading balance sheet for Continental for the audit year 1962. All of the statements in Continental's 1962 balance sheet alleged by the indictment to be false and misleading would seem to be material to the trustee's actions, and at least two are specifically alleged in the trustee's July 1965 complaint.

After Judge Mishler had denied the appellee Kaiser's application for a protective order staying his deposition on October 24, 1966, Kaiser was deposed at two sessions on October 26 and 31, 1966. The appellees then moved before Judge Bryan on November 1, 1966 for an order enjoining the trustee from taking their depositions prior to the Southern District criminal trial. At the hearing of this motion on November 4, 1966, Judge Bryan issued a temporary restraining order pending its determination. On December 5, 1966, without application by the trustee, Judge Mishler directed Kaiser to appear for a continued deposition. This Court on December 8, 1966 stayed Judge Mishler's order until December 12, 1966, and after Judge Bryan's decision on December 12 further stayed Judge Mishler's order pending the expedited hearing and determination of any appeal from Judge Bryan's order of December 16, which appeal was later perfected and is now before us.

Judge Bryan held that he had the power to enjoin the trustee from taking the appellees' depositions both under the All Writs Act, 62 Stat. 944 (1948), as amended, 28 U.S.C. § 1651(a), and in exercise of the court's super-

visory power over the administration of federal criminal justice. See, e.g., McNabb *v.* United States, 318 U. S. 332, 340-41 (1943). He concluded that this power should be exercised because "it is reasonably likely that such unfairness will result as threatens the integrity of these criminal proceedings" if the prosecution is permitted to use appellees' deposition testimony when it could not under the Federal Rules of Criminal Procedure obtain criminal discovery against them, 262 F. Supp. 64 (S.D.N.Y. 1966).

Both holdings present questions of first impression. No federal district court in a criminal case has ever enjoined a party to a civil action in another jurisdiction from litigating the civil action or taking testimony in it, either under the All Writs Act, compare Steelman *v.* All Continent Corp., 301 U. S. 278 (1937) (injunction restraining action against trustee in bankruptcy), or under the supervisory power, which the Supreme Court has implemented by formulating rules for the conduct of criminal trials, e.g., Cheff *v.* Schnackenberg, 384 U. S. 373 (1966); McNabb *v.* United States, supra, or by enjoining the commission of acts by "federal law enforcement agencies." Rea *v.* United States, 350 U. S. 214, 217 (1956). We assume without deciding that the lower court had power to issue such an injunction, but we hold that it should not have done so, as there is no showing that the depositions sought by the trustee would interfere with the trial of the indictment or the appellees' preparation of their defense.

This appeal requires us to balance appellees' desire to prevent pretrial disclosure of their factual contentions to the prosecution in the Southern District criminal proceed-

ing, without asserting their fifth amendment privileges against self-incrimination, against the interest of the trustee, representing numerous creditors and public security holders of Continental, in the expeditious progress of the Eastern District action. The trustee requires the appellees' deposition testimony to complete his preparation for the trial of the Eastern District action, which must be received before the bankruptcy reorganization of Continental, already three and one-half years old, can be completed. It is conceded that the trustee seeks in good faith to depose appellees for purposes of the Eastern District action, and that there has been no consultation on lines of questioning between the trustee and the United States Attorney for the Southern District.

Under these circumstances, the public interest in the progress of the Eastern District action clearly outweighs the appellees' interest in withholding their testimony until after the Southern District trial without invoking their privileges against self-incrimination. It could hardly be contended, and appellees do not contend, that the prosecution in the Southern District could be enjoined from using the deposition testimony given by the appellee Simon before the Southern District indictment was returned. As long as appellees' preparation for the Southern District criminal trial is not hampered, we see no valid distinction in the fact that appellees' remaining depositions could not be scheduled until after the indictment was returned. In both cases, if appellees choose not to assert their privileges against self-incrimination, we see no reason why their testimony should be withheld from the trustee. The fact that additional testimony thereby becomes available to the government is merely the natural byproduct of another

judicial proceeding; and to that extent it might be "discovery", but it is not discovery which the government has initiated or promoted for the purpose of circumventing the Federal Rules of Criminal Procedure or any constitutional right of the appellees. Indeed the constitutional rights of the appellees are unimpaired; here they are in suspension because the appellees have not chosen to avail themselves of their Fifth Amendment privileges.

It is true that appellees have testified in the trustee's depositions and before the grand jury that indicted them without asserting their privileges against self-incrimination. Since, however, "it is well established that a waiver of the privilege in one proceeding does not affect the rights of a witness or the accused in another independent proceeding," United States *v.* Miranti, 253 F. 2d 135, 139 (2 Cir. 1958); see 8 Wigmore, Evidence §2276, at 470-72 (McNaughton rev. 1961), the appellees Kaiser and Fishman certainly, and Simon probably, could have interposed the privilege when the trustee sought to depose them after the indictment was returned.

Appellees urge that, as accountants, they "would lose their professional lives" by invoking the privilege. We are not sure that they would, if it were made clear that the privilege was claimed only on advice of counsel in order to prevent pretrial disclosure of their factual contentions. Whether or not they would, however, the same dilemma is faced by any witness in a civil or criminal trial who is himself under investigation or indictment for other crimes. Such a witness must either invoke his privilege against self-incrimination, or assume "the general duty to give what testimony one is capable of giving." See 8 Wigmore, Evidence §2192 (McNaughton rev. 1961).

It is for the same reason that a witness who has been given immunity from prosecution must testify although his testimony may expose him to such extralegal pressures as "loss of job, expulsion from labor unions, state registration and investigation statutes, passport eligibility, and general public opprobrium." Ullmann *v.* United States, 350 U. S. 422, 430 (1955); see Piemonte *v.* United States, 367 U. S. 556 (1961). We cannot agree that "civilized standards of procedure and evidence," McNabb *v.* United States, supra at 340, require that a witness under indictment be given the option of non-appearance in any proceedings in related civil or criminal cases until his own trial is concluded.

We are also led to reverse Judge Bryan's order by the consideration that injunctions against prosecution of independent actions are fraught with possibilities of conflict between courts, which a court of appeals may not in other cases be in so happy a position to resolve as we are here. If this injunction were upheld, a like one might well be issued against the prosecution of an action in a district court outside this circuit, or even in a state court. Especially as a defendant called upon to depose in a civil case in a federal district court can move in that court under Fed. R. Civ. P. 30(b) to stay or limit the deposition, the district court in which the criminal case is pending should enjoin the taking of such a deposition only in exceptional circumstances. As we have held, no such circumstances are present here.

Judge Bryan relied heavily upon two lines of cases in which "it has been consistently held that where both civil and criminal proceedings arise out of the same or related transactions an objecting party is generally entitled to a

stay of discovery in the civil action until disposition of the criminal matter * * * whether the defendant in the criminal case seeks to use the civil rules to obtain disclosure of the Government's evidence," citing, for example, Campbell *v.* Eastland, 307 F. 2d 478 (5 Cir. 1962), cert. denied, 371 U. S. 955 (1963), "or whether the Government seeks a similar advantage to secure evidence not otherwise available to the prosecution," citing Perry *v.* McGuire, 36 F.R.D. 272 (S.D.N.Y. 1964), Paul Harrigan & Sons, Inc. *v.* Enterprise Animal Oil Co., Inc., 14 F.R.D. 333 (E.D. Pa. 1953), and National Discount Corp. *v.* Holzbaugh, 13 F.R.D. 236 (E.D. Mich. 1952). 262 F. Supp. at 74.

Both lines of cases seem to us to be inapposite. Cases where the criminal defendant seeks disclosure of the government's evidence, or the government seeks disclosure of the defendant's, are distinguishable because here the trustee, who seeks to depose appellees, is pursuing an independent action on behalf of Continental's creditors and security holders, which was commenced more than one year before the indictment was found. And the cases in the second line appear to us, as they did to Judge Mishler in his opinion of October 24, 1966, to rest upon the deponent's assertion of his privilege against self-incrimination; to the extent that they do not, we decline to follow them. In both National Discount Corp. *v.* Holzbaugh, supra, and Paul Harrigan & Sons, Inc. *v.* Enterprise Animal Oil, Inc., supra, the deponents explicitly asserted their privileges against self-incrimination, and the court in Perry *v.* McGuire, supra, cited both cases in holding that interrogatories directed to a criminal defendant "would be oppressive and would infringe on his constitutional rights." 36

F.R.D. at 273. Moreover, all three cases arose on Rule 30(b) motions made in the court in which the civil action was pending; none is a precedent for the injunction Judge Bryan issued.

Of course, if the district court should find that the taking of the depositions of the appellees threatens to interfere with the trial of the indictment or with such preparation of their defenses by the appellees, as may be necessary, the district court has the power to take appropriate action.

Reversed. (The mandate shall go down forthwith).

FEINBERG, Circuit Judge (dissenting):

I dissent.

I would have affirmed on the basis of Judge Bryan's thorough opinion in the trial court. The next best thing to do is to dissent on the basis of that opinion, which is reported at 262 F. Supp. 64. It should be read in conjunction with the majority opinion because Judge Bryan clearly and convincingly states the reasons for the ninety-day injunction under attack. I adopt his basic reasoning and add only a few thoughts addressed to the majority opinion.

Since the district court's power to enjoin is assumed, the issue is one of discretion. The majority largely ignores the basic reason given by the district judge for his exercise of that discretion—that otherwise the criminal trial of these defendants will be fundamentally unfair. If the trial court by order allowed the Government full discovery in the criminal case and denied it to defendants, all would agree that this would be basically unfair. Yet that is what may well happen because of this reversal. The absence of collusion between the trustee in the civil suit and the Government in the criminal suit is not controlling; the effect

of the discovery on defendants in the criminal case is. The majority can see no distinction between use of depositions taken before and after the criminal indictment. To me the distinction is clear. Once the indictment was filed, the court in which those charges were to be tried had the duty to keep the criminal proceedings fair. In the absence of such proceedings, there was, of course, no correlative duty.

In addition, even if I had doubts about the correctness of the trial court's action—and I do not—the reversal is totally uncalled for. The injunction by its terms expires in about two weeks. I see no adequate reason why the conflicting interests cannot be again left to the discretion of the district judge on March 17. At that time, he will be able to appraise the situation again in the light of circumstances then existing. For example, he can consider whether the criminal trial is being unduly delayed by defendants Simon, Kaiser and Fisher, whether they will adhere to the assurance given on oral argument of preparing for a trial date in May, whether a Rule 2 judge has been appointed to expedite that trial, whether it is now true (as apparently it was not on the record before Judge Bryan) that the trustee has no other meaningful depositions to take, and whether, if there is going to be significant delay, it might be practical to allow depositions with appropriate prohibitions on use of them by the Government.

In other words, I think the district judge was right, and, in any event, would allow him to exercise his discretion again on March 17 when the injunction expires. *Cf.* Nederlandse Erts-Tankersmaatschappij, N.V. *v.* Isbrandtsen Co., 362 F. 2d 205 (2d Cir. 1966).

## APPENDIX B

## Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of March one thousand nine hundred and sixty-seven.

Present: Hon. J. EDWARD LUMBARD, *Chief Judge,*
Hon. J. JOSEPH SMITH,
Hon. WILFRED FEINBERG, *Circuit Judges.*

UNITED STATES OF AMERICA,
*Plaintiff,*

*v.*

CARL SIMON, ROBERT KAISER and MELVIN FISHMAN,
*Defendants-Appellees,*

HAROLD ROTH,
*Defendant,*

IRVING L. WHARTON,
*Appellant.*

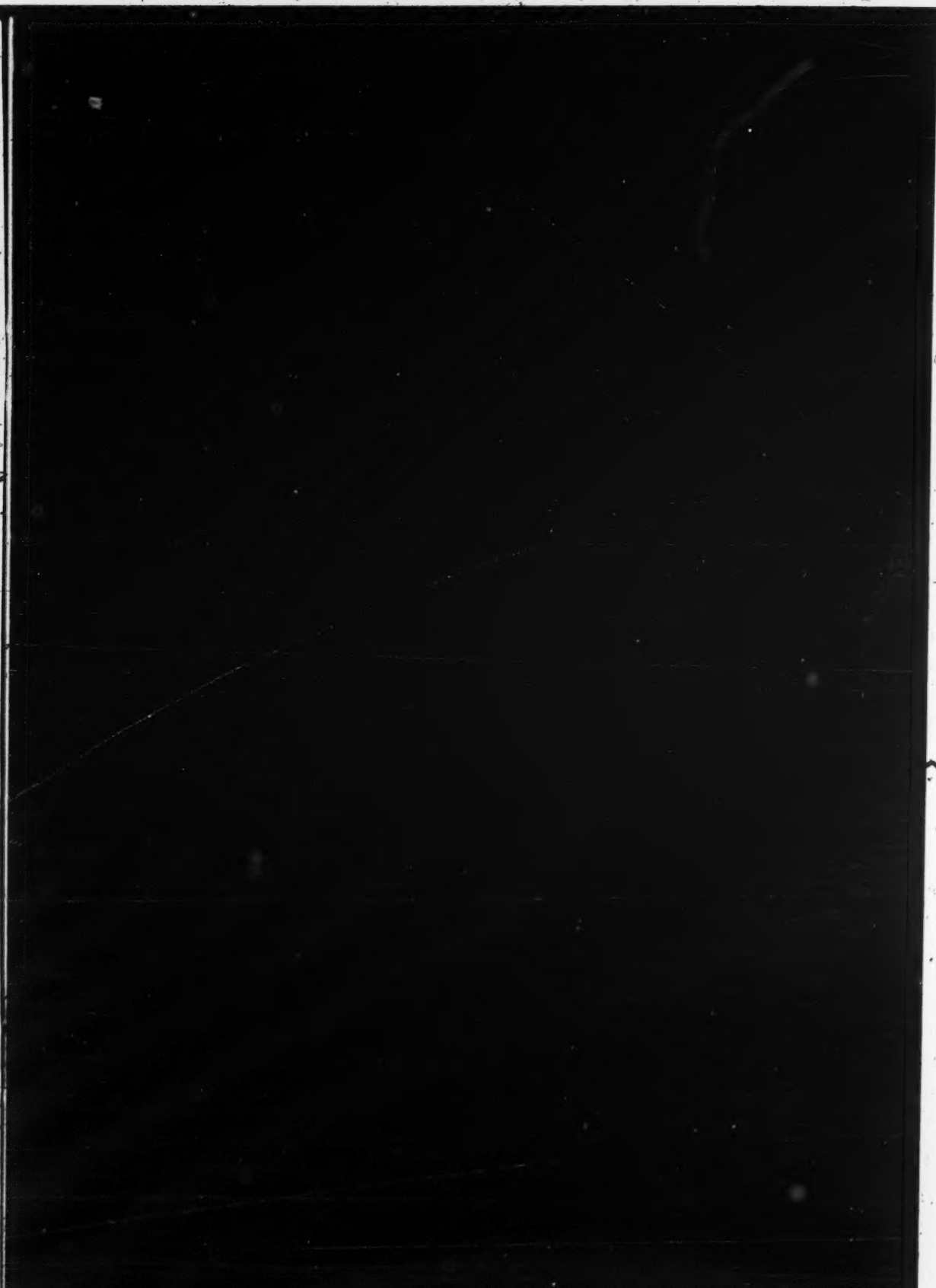
Appeal from the United States District Court for the Southern District of New York.

*Judgment of Court of Appeals*

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed.

A. Daniel Fusaro,
Clerk.



## APPENDIX C

## Opinion of District Court Filed December 12, 1966

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

66 Crim. 831

UNITED STATES OF AMERICA

*v.*

CARL SIMON, HAROLD ROTH, ROBERT KAISER and MELVIN FISHMAN,

*Defendants.*

FREDERICK VAN PELT BRYAN, District Judge:

Defendants Simon, Kaiser and Fishman are certified public accountants, the first two of whom are members of the prominent accounting firm of Lybrand, Ross Bros. & Montgomery (Lybrand), and the third a senior associate of that firm. They have pleaded not guilty to a six count indictment filed on October 17, 1966, charging them with conspiracy to commit mail fraud and to make false statements in violation of the Securities and Exchange Act, 18 U.S.C. §§ 371, 1001, 1341; 15 U.S.C. § 78ff, and with substantive mail fraud offenses. 18 U.S.C. §§ 2, 1341. Roth, former president of Continental Vending Machine Corporation (Continental) is also named as a defendant. The Lybrand firm and others are named as co-conspirators but not as defendants.

These criminal charges arise out of the affairs of Continental and a subsidiary which are presently in proceed-

ings for reorganization under Chapter X of the Bankruptcy Act in the United States District Court for the Eastern District of New York.

Defendants Simon, Kaiser and Fishman have applied to this court sitting in the criminal action against them in this district for an order enjoining the Trustee in Reorganization of Continental, pending the trial of the criminal action, from taking their depositions and the depositions of other partners and employees of the Lybrand firm in two civil actions in the Eastern District of New York (at least one of which involves the same transactions which are the subject of this indictment against them) and for other relief.

Simon, Kaiser and Fishman assert that the injunctive relief which they seek is necessary in order to preserve the integrity and fairness of the criminal proceedings presently pending, to prevent the complete disclosure to the prosecution in advance of trial of their defense and the evidence upon which it will necessarily rest, and to permit them the necessary time and facilities for the intensive preparation required for a proper defense.

I.

The facts out of which this application arises are as follows:

In July 1965 the Trustee in Reorganization of Continental commenced a civil action in the United States District Court for the Eastern District of New York against the Lybrand firm, the Meadowbrook National Bank and Roth seeking damages of $41,000,000 resulting from alleged acts of defendants in connection with the affairs of Continental. The action is being actively prosecuted by

the plaintiff Trustee. Another civil action by the Trustee arising out of the affairs of Continental against a large number of individuals and corporations was commenced in that District in 1964 and is also being actively prosecuted.

For some time the Trustee of Continental has been taking the depositions of witnesses in the pending civil actions in the Eastern District in preparation for trial. Arrangements had been made to take the depositions of Simon, Kaiser and Fishman. Pursuant thereto the deposition of Simon was taken, which ran to some 1,800 pages and is still open for further testimony at this time. The deposition of Kaiser was scheduled. Before it commenced, however, the present indictment against Simon, Kaiser and Fishman was filed in this court on October 17, 1966.

When the indictment was filed, Kaiser moved in the Trustee's civil actions in the Eastern District before Judge Mishler for a protective order, under Rule 30(b), F. R. Civ. P., staying Kaiser's deposition on the ground that in view of the newly-instituted criminal action against him in the Southern District the taking of the deposition would violate his fifth amendment privilege against self-incrimination and would therefore be oppressive.

On October 24, 1966 Judge Mishler denied Kaiser's motion for a protective order in a memorandum decision. In the course of his memorandum he said that it is "clear that transactions on which the civil claims are stated, in the main, form the basis of the criminal charge." The narrow issue posed before him was whether compulsory appearance for examination was oppressive as violating Kaiser's fifth amendment rights against self-incrimination. Noting that counsel for Kaiser had declined to say whether

Kaiser would assert his constitutional privilege, Judge Mishler held that the fifth amendment privilege did not excuse Kaiser from appearing for examination; that the privilege could only be asserted in answer to specific questions put to him; that Kaiser was free to assert his privilege when questions which might incriminate were put to him, and that his fifth amendment rights were thus fully protected. Kaiser was directed to appear for examination by the plaintiff Trustee on October 26, 1966. An appeal from Judge Mishler's order was dismissed by the Court of Appeals on the ground that the order was non-appealable and an application for a stay was denied on October 25, 1966. Kaiser then appeared for deposition as directed and was examined by the Trustee's counsel on October 31.

On November 1, 1966, attorneys for Simon, Kaiser and Fishman as defendants in the criminal action in this court presented to me, sitting in criminal motion part, an order requiring the Continental Trustee and the United States Attorney for the Southern District of New York to show cause why an injunction should not issue against the Trustee and his attorneys restraining them from taking the testimony of Simon, Kaiser, Fishman or any other partner or employee of Lybrand or from seeking to compel the production of any records of that firm in the civil actions pending in the Eastern District of New York until the trial of the criminal indictment here.

After hearing the attorneys for the Continental Trustee and the United States Attorney, I set down the order to show cause for argument before me in criminal motion part on November 4, 1966, and issued a temporary re-

straining order against taking the depositions of Simon, Kaiser, Fishman and other partners or employees of Lybrand, pending the hearing of the application. The attorneys for the Continental Trustee and the United States Attorney then accepted service of the order to show cause containing the restraining provisions and the accompanying papers.

On November 4, 1966, the return day of the order to show cause, counsel for defendants Simon, Kaiser and Fishman argued in support of the application for injunctive relief and counsel for the Continental Trustee argued in opposition. The United States Attorney took no position on the merits of the application. At the conclusion of the argument decision was reserved. Time was granted to submit additional papers and briefs[1] and the examination of defendants Simon, Kaiser and Fishman and of partners and employees of Lybrand was enjoined from the bench pending determination of the application.

## II.

Does this court, sitting in the criminal action pending against the moving defendants, have the power to grant relief of the nature sought here?

[1, 2] There is no doubt that "a fair trial in a fair tribunal is a basic requirement of due process." In re Murchison, 349 U. S. 133, 136, 75 S. Ct. 623, 625, 99 L.Ed. 942 (1954). Moreover, unfairness at any stage of criminal proceedings may affect the fairness of the trial

1. The last papers submitted in the regular course were received on November 16, 1966, though additional papers were submitted on December 1 and December 9.

itself and imperil any judgment of conviction under a system of law such as ours which "has always endeavored to prevent even the probability of unfairness." *Ibid.*

[3] It is clear to me that a district court having jurisdiction over a criminal action, see 18 U.S.C. § 3231, has the power in appropriate circumstances to grant injunctive relief to preserve the fairness and integrity of the criminal proceedings before it. Such power stems from either one or both of two sources.

[4] First, 28 U.S.C. § 1651 (the All Writs Act) provides that United States District Courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions." The All Writs Act has been held to have been properly invoked in aid of the jurisdiction of the federal courts in, for example, the areas of bankruptcy, Steelman *v.* All Continent Corp., 301 U. S. 278, 57 S. Ct. 705, 81 L.Ed. 1085 (1937), (injunction against prosecution of suit in another District Court), stockholder litigation, Havner *v.* Hegnes, 269 F. 537 (8 Cir. 1920), (injunction against prosecution of action in State Court) and civil rights. Bulloch *v.* United States, 265 F. 2d 683, 691 (6 Cir.), cert. den., 360 U. S. 909, 79 S. Ct. 1294, 3 L.Ed. 1260 (1959). Indeed, the Supreme Court in *Steelman* speaks of the enjoining by the bankruptcy court of suits in other federal courts even where "they have a tendency to embarrass administration • • •." 301 U. S. at 289, 57 S. Ct. at 710. It can scarcely be said that federal courts have less power where criminal proceedings are concerned. Thus a federal criminal court is empowered to grant relief affecting other litigation pending in the federal courts

where "necessary and appropriate" to protect the fairness and integrity of criminal proceedings before it.[2]

[5] Second, apart from the All Writs Act, the federal criminal court has other powers to grant injunctive relief to protect the fairness of the criminal proceedings before it. Whether this be said to derive from the court's inherent equity jurisdiction,[3] or from its supervisory powers over the administration of criminal justice both generally and under the Federal Rules of Criminal Procedure, is not of great consequence.

As Justice Frankfurter said in McNabb *v.* United States, 318 U. S. 332, 340, 63 S. Ct. 608, 613, 87 L.Ed. 819 (1943), judicial supervision of the administration of federal criminal justice by the federal courts "implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force." See also Nardone *v.* United States, 308 U. S. 338, 339, 342, 60 S. Ct. 266, 84 L.Ed. 307 (1939).

The Federal Rules of Criminal Procedure, "intended to provide for the just determination of every criminal pro-

2. See the discussion of the original version of the All Writs Act in Wayman *v.* Southard, 23 U. S. (10 Wheat.) 1, 22-24, 6 L.Ed. 253 (1825); cf. McCulloch *v.* State of Maryland, 17 U. S. (4 Wheat.) 316, 413-425, 4 L.Ed. 579 (1819).

3. Cf. Rudnicki *v.* McCormack, 210 F. Supp. 905, 909 (D. Mass. 1962), appeal dismissed sub nom Rudnicki *v.* Cox, 372 U. S. 226, 83 S. Ct. 679, 9 L.Ed. 2d 714 (1963). See also Landis *v.* North American Co., 299 U. S. 248, 57 S. Ct. 163, 81 L.Ed. 153 (1936).

ceeding," must be construed by the courts "to secure • • • fairness in administration." Rule 2. And the courts are authorized, if no procedure is specifically prescribed by rule, to "proceed in any lawful manner not inconsistent with these rules or with any applicable statute." Rule 57(b); cf. Petition of Petrol Shipping Corp. *v.* Kingdom of Greece, Ministry of Com., 360 F. 2d 103 (2 Cir. 1966).

[6] These powers of the federal criminal court are not confined to the protection of an identified federal constitutional right. McNabb *v.* United States, supra. Nor may these powers be used only against participants in criminal proceedings pending before the court. They extend to policing the requirements of the federal rules in the interests of fundamental fairness even against persons coming within their jurisdiction who are not parties to proceedings. Rea *v.* United States, 350 U. S. 214, 76 S. Ct. 292, 100 L.Ed. 233 (1956); see Go-Bart Importing Co. *v.* United States, 282 U. S. 344, 51 S. Ct. 153, 75 L.Ed. 374 (1931); In re No. 32 East 67th Street, Borough of Manhattan, City of New York, 96 F. 2d 153 (2 Cir. 1938). See also Wise *v.* Henkel, 220 U. S. 556, 31 S. Ct. 599, 55 L.Ed. 581 (1911).

The broad supervisory power vested in the criminal courts to protect proceedings before them against unfairness is dramatically emphasized in a different context by Justice Clark's recent opinion in Sheppard *v.* Maxwell, 384 U. S. 333, 86 S. Ct. 1507, 16 L.Ed. 2d 600 (1966). That case dealt with the failure of a state trial judge to fulfill his duty to protect the defendant from inherently prejudicial publicity which saturated the community and

to control disruptive influences in and out of the courtroom. A Federal criminal court certainly has at least as much power to prevent "prosecutors, counsel for defense, the accused, witnesses, court staff, [or] enforcement officers coming under the jurisdiction of the court" from engaging in conduct which is likely to result in an unfair trial. 384 U. S. at 363, 86 S. Ct. at 1522.

[7] The powers vested in the federal courts to protect against unfairness in the administration of federal criminal justice must necessarily extend also to litigants and attorneys in civil actions in the federal courts where the use of federal civil process threatens such unfairness.

III.

[8, 9] When and under what circumstances should such power be exercised? Plainly it should not be invoked without due caution and restraint. The burden of showing the probability of "essential unfairness * * * as a demonstrable reality," Adams *v.* United States ex rel. McCann, 317 U. S. 269, 281, 63 S. Ct. 236, 242, 87 L.Ed. 268 (1942), Sheppard *v.* Maxwell, supra, 384 U. S. at 351-352, 86 S. Ct. 1507, rests on the party invoking the power. In all but a few extreme cases prejudice to the accused must be identifiable. Estes *v.* State of Texas, 381 U. S. 532, 542-543 85 S. Ct. 1628, 14 L.Ed. 2d 543 (1965). Moreover, as in any other application for relief in the nature of injunction the prejudice to the party seeking relief must be weighed against any prejudice to the persons against whom relief is sought. But upon a proper showing of the probability of unfairness which may affect the

course of the criminal proceedings the criminal court has not only the power but the duty to act.

IV.

I turn then to the contentions and the facts on the present application.

(a)

It is not seriously disputed that the subject matter of this indictment and that of the complaint in the civil action against Lybrand are in the main the same. Both charge fraud with respect to a number of the same transactions. It may be noted that this is not a routine criminal case. The indictment, insofar as I am aware, is the first in which charges of mail fraud based on transactions of this nature have been brought against leading certified public accountants. It has received substantial publicity and comment in the press.[4]

As appears from the complaint and the indictment, these charges involve a very complicated set of facts which resulted in an alleged loss of over forty million dollars to Continental, forcing it into Chapter X proceedings. The difficulty and complexity of the matters involved is to some extent indicated, among other things, by the printed complaint of some fifty pages in the civil action against Lybrand as well by the fact that, as I have mentioned, the deposition of defendant Simon taken before the indictment was returned (and which is still open) has already run to some 1,800 pages. Moreover, the transcript of the two

4. N. Y. Times, Oct. 18, p. 61, col. 7; Wall St. Journal, Oct. 18, p. 32, col. 2.

days of testimony of defendant Kaiser, taken before this application was made, shows that the questioning of Kaiser by counsel for the Trustee, largely in the nature of cross-examination, has been sharp and searching.

Defendants Simon, Kaiser and Fishman urge that if their depositions are taken at this time by the Continental Trustee in the pending Eastern District civil actions it is reasonably probable that they will suffer irreparable prejudice in the defense of the criminal action against them and that the resulting unfairness may well impair the integrity of the criminal proceedings. They say that the continuation of these examinations will, in all likelihood, result in a disclosure to the prosecution before trial of their entire defense in the criminal action; that they will be forced to reveal the nature and details of their defense, the evidence on which it will be based, their trial tactics and strategy and the positions which they will take on the stand; that this will permit the prosecution to circumvent the restrictions on discovery in the Federal Rules of Criminal Procedure; that the prosecution will be given an undue and highly unfair advantage over the defense; and that if injunctive relief is not forthcoming the resulting unfairness is likely to impair the integrity of the trial and to have serious due process implications.

Defendants' position does not rest on protection of their rights against self-incrimination under the fifth amendment. Indeed, counsel for the defendants has flatly stated to the court that the defendants have no intention of asserting their fifth amendment privilege and will not do so under any circumstances. Defendants state that because of their professional position and standing in the business community they are in no position to take the fifth amend-

ment even if they were so minded. They insist that they are wholly innocent of the charges against them, that they wish to have all the relevant facts and circumstances completely brought out in the course of their defense at the proper time, but that they should not be compelled to do so before trial.

The Trustee points to the fact that the Government is not a party to the civil suit, and that his examinations are not being conducted for the purpose of exposing the defense in the criminal action but for legitimate purposes of the civil suit. As mentioned, the United States Attorney originally did not take any position on the merits of the application. But it is significant that he strenuously opposed the suggestion, made during the course of argument, that there might be an interdiction of any communications between the Trustee and the prosecution concerning the depositions or their subject matter.

It is not denied that during the course of the Trustee's investigations and preparations for trial information affecting the criminal prosecution, transcripts of examination and exhibits have been available to the United States Attorney. That, of course, was entirely proper and to be expected of a diligent prosecutor.

It also can be reasonably anticipated that if the depositions of the moving defendants continue to be taken, the United States Attorney will have full information as to their contents with consequent full disclosure of defendants' case in advance of trial. That there is no deliberate collusion between the Trustee and the United States Attorney's Office is not controlling. The fact of the matter is that if the examinations of these defendants in the civil action are continued, the prosecution is likely to discover

—and make use of—vital information about the defense which it could not otherwise secure. The problem here transcends that of dealing with specific answers to specific questions, which may or may not be adequately handled by the trial court. Rather it relates to the disclosure of the defendants' entire case and the evidence upon which they will rely.

(b)

[10] It is unnecessary to dwell at any length on the wide differences between discovery in civil and criminal cases. The deposition and discovery process in civil litigation rests upon a broad footing of full mutual disclosure of information. On the other hand, the Rules of Criminal Procedure restrict disclosures to a minimum. As Judge Wisdom said in Campbell *v.* Eastland, 307 F. 2d 478, 487 (5 Cir. 1962):

> "There is a clear-cut distinction between private interests in civil litigation and the public interest in a criminal prosecution, between a civil trial and a criminal trial, and between the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure.
>
> • • • • •
>
> "• • • While the Federal Rules of Civil Procedure have provided a well-stocked battery of discovery procedures, the rules governing criminal discovery are far more restrictive. Compare Rules 26 through 37, Fed.R.Civ.P., • • • with Rules 15, 16, and 17, Fed.R.Crim.P., • • •. Separate policies and objectives support these different rules."

The contrasts between the policies and objectives of the civil and criminal procedure are particularly apparent in the provisions of the respective rules relating to depositions. The civil rules permit both sides the broadest latitude in taking the deposition of any person, including a party, on any matter "relevant to the subject matter involved in the pending action." Rule 26(b), F.R.Civ.P. The scope of examination even extends to the identity and location of persons having knowledge of relevant facts and matters reasonably calculated to lead to the discovery of admissible evidence. Full cross-examination of adverse parties or hostile witnesses is permitted. Rule 26(b), (c), F.R.Civ.P.

Of course, in criminal cases depositions of parties are not permitted at all and depositions of witnesses are confined to those who are absent, as provided in Rule 15, F.R.Cr.P. What little discovery of documents, statements and tangible objects is allowed to the prosecution, is subject to severe restrictions even under the liberalized provisions of new Rule 16.[5]

[11] Thus, while in civil litigation "[t]he way is now clear, consistent with recognized privileges, for the par-

5. Rule 16(c) reads in pertinent part:

"(c) Discovery by the Government. *If the court grants relief sought by the defendant under subdivision (a) (2) or subdivision (b) of this rule,* it may, upon motion of the government, condition its order by requiring that the defendant permit the government to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which are within his possession, custody or control, *upon a showing of materiality to the preparation of the government's case and that the request is reasonable.*" (Emphasis added.)

ties to obtain the fullest possible knowledge of the issues and facts before trial," Hickman *v.* Taylor, 329 U. S. 495, 501, 67 S. Ct. 385, 389, 91 L.Ed. 451 (1947), criminal litigation has made no such concessions to modern concepts. It is still conducted largely on the "sporting" theory of justice. That only serves to emphasize the necessity for the rules of the game being applied equally to both prosecution and defense so that neither can obtain unfair advantage over the other.

[12] If there is reasonable probability that either the prosecution or the defense will be able to secure a full disclosure of the other side's case while relying on the rules to prevent disclosure of its own, there is, as I view it, unfairness likely to affect the result of the trial of such importance and significance as to require the intervention of the criminal court to ensure the fair administration of criminal justice and the rules governing it.

(c)

The practical effect of denying injunctive relief against the taking of the depositions of the three criminal defendants at this time is likely to permit the prosecution to have full disclosure in contravention of the protections given defendants by the Rules of Criminal Procedure. The question to be decided here is whether requiring the defendants to submit to examination in these related civil actions will so prejudice their rights to defend themselves against the criminal charges as to justify this court in using its injunctive powers.

[13] The problem is by no means novel. It has been consistently held that where both civil and criminal pro-

ceedings arise out of the same or related transactions an objecting party is generally entitled to a stay of discovery in the civil action until disposition of the criminal matter. This has been true whether the defendant in the criminal case seeks to use the civil rules to obtain disclosure of the Government's evidence, see Campbell *v.* Eastland, 307 F. 2d 478 (5 Cir. 1962), cert. den., 371 U. S. 955, 83 S. Ct. 502, 9 L.Ed. 2d 502 (1963); United States *v.* $2,437.00 United States Currency, D.C., 36 F.R.D. 257 (E.D.N.Y. 1964); United States *v.* Steffes, 35 F.R.D. 24 (D. Mont. 1964); United States *v.* Maine Lobstermen's Association, 22 F.R.D. 199 (D. Maine 1958); United States *v.* Linen Supply Institute of Greater New York, 18 F.R.D. 452 (S.D.N.Y. 1955); United States *v.* Bridges, 86 F. Supp. 931 (N.D. Calif. 1949); United States *v.* A. B. Dick Co., 7 F.R.D. 442 (N.D. Ohio 1947); Zara Contracting Co. *v.* State of New York, 22 A.D. 2d 415, 256 N.Y.S. 2d 98 (3rd Dep't. 1965); United States *v.* One 1964 Cadillac Coupe, — F.R.D. —, (S.D.N.Y. 1966); United States *v.* One 1963 Chevrolet Sedan, Misc. No. 63-M-1239 (E.D.N.Y. 1963), or whether the Government seeks a similar advantage to secure evidence not otherwise available to the prosecution. See Perry *v.* McGuire, 36 F.R.D. 272 (S.D.N.Y. 1964); Paul Harrigan & Sons, Inc. *v.* Enterprise Animal Oil Co., Inc., 14 F.R.D. 333 (E.D. Pa. 1953); National Discount Corp. *v.* Holzbaugh, 13 F.R.D. 236 (E.D. Mich. 1952). But see Hiss *v.* Chambers, 8 F.R.D. 480 (D. Md. 1948).

[14] The controlling consideration in these cases appears to be the protection of the paramount public interest in ensuring the essential fairness of criminal proceedings

under the Rules of Procedure laid down for their conduct. Thus while Paul Harrigan & Sons, Inc., supra, seems to be predicated on the probability that the attempted discovery would violate the defendants' fifth amendment privilege against self-incrimination, Perry *v.* McGuire, supra, and National Discount Corp. *v.* Holzbaugh, supra, apparently were based on the broader ground of the inherent unfairness of compelling disclosure of a criminal defendant's evidence and defenses before trial. And it may be noted that in the many cases where civil discovery has been stayed to prevent disclosure of the evidence to be used by the Government in the criminal prosecution, no fifth amendment self-incrimination question could arise.

It would be wholly unrealistic to suppose that the prosecution in a criminal proceeding would not gain a very substantial advantage over the defendants if the nature of their defense and the evidence on which the defense was based were disclosed to the Government in advance of—and indeed here long in advance of—trial. Every experienced trial lawyer knows well the advantages the prosecution would be likely to gain under such circumstances.

With such material at its disposal a zealous prosecutor would be able to tailor his case to overcome anticipated defenses and avoid any possibility of surprise. If the defendants took the stand in their own defense, as appears probable in this case, there will already have been a thorough cross-examination of each of them by able and zealous counsel, a very material advantage to the prosecution in conducting its own cross-examination. The advantages gained to the prosecution might well be sufficient to tip the scales in favor of conviction particularly in a

close case. Under these circumstances the prosecution should not be permitted "to obtain information through the medium of the civil proceedings to which [it was] not entitled, or in a manner in which [it was] not entitled, under the criminal rules." United States *v.* Maine Lobstermen's Ass'n, D. C., 22 F.R.D. 199, 201 (D. Maine 1958); see Campbell *v.* Eastland, supra. This would circumvent the limitations provided by the criminal rules to ensure the fair administration of criminal justice from the standpoint both of the defense and prosecution.

It is no answer to the contentions raised here to say that injunctive relief should not be granted against the Trustee because the extent of the prejudice or harm which might result to the criminal defendants cannot be presently evaluated in view of the mass of information already available about the transactions which are the subject of the indictment and the civil complaint. That argument defeats itself. The more complicated and voluminous the facts and the more difficult the issues, the more probable it is that such harm may occur.

[15] Nor do the facts that two of the defendants have appeared before the Grand Jury, that Simon has already been examined by the Trustee at length and Kaiser to some extent, and that other persons connected with Lybrand have also been examined indicate that defendants should be denied relief. Each of the three defendants has been newly-charged individually with serious crimes. It has not been shown here that the full nature and details of their respective individual defenses to those charges have been already exposed. Indeed it is likely that the details of their defenses are still being formulated. It is precisely

because it is difficult to forecast the precise harm which may result to the defendants that injunctive relief is necessary for their protection.

[16] Nor is it a solution to the problem raised here to say that defendants could fully protect themselves from any disclosure by raising their fifth amendment privilege against self-incrimination when specific questions are put to them. Not only have they taken the position that they will not assert their fifth amendment privilege but they do not in any way rely on their fifth amendment rights on this application.

[17] The rights on which defendants rely here are those governing the conduct of criminal proceedings with a view to assuring the fair administration of criminal justice to all parties. The supervisory powers of the federal courts over the administration of criminal justice are not confined to protecting the accused against fifth amendment violations. Thus in McNabb *v.* United States, supra, the Supreme Court did not rely on fifth amendment rights against self-incrimination as a ground for denying the prosecution the use of incriminating statements by the accused since the statements appeared to have been voluntary. It held, however, that the statements could not be admitted because defendant's statutory rights to a prompt arraignment had been violated. As the Court said, the scope of the power resting in the criminal courts was "not confined to ascertainment of Constitutional validity." 318 U. S. at 340, 63 S. Ct. at 613. It held the prosecution was barred from using the statements "[q]uite apart from the Constitution." Id. at 341, 63 S. Ct. 608. See Nardone *v.* United States, supra. Compare Casenote, 76 Harv. L. Rev. 838 (1963).

Similarly, if the search and seizure provisions of Rule 41 of the Rules of Criminal Procedure are violated it is not a prerequisite to relief by the federal criminal court that the violations rise to constitutional dimensions. In Rea *v.* United States, supra, for example, a federal agent was enjoined from testifying in a state criminal trial concerning material obtained by a search and seizure in violation of Rule 41 of the Federal Rules of Criminal Procedure. The court said:

> "A federal agent has violated the federal Rules governing searches and seizures—Rules prescribed by this Court and made effective after submission to the Congress. * * * The power of the federal courts extends to policing those requirements and making certain that they are observed." 350 U. S. at 217, 76 S. Ct. at 294.

And it went on to say "[t]o enjoin the federal agent from testifying is merely to enforce the federal Rules against those owing obedience to them." Ibid.

[18] I see no reason why a defendant should be compelled to assert his fifth amendment privilege against self-incrimination against his will in order to protect other and different rights granted him by rule, statute, constitution, or even considerations of basic fairness. The situation presented here is plainly an unusual one. It is not often that defendants elect to eschew their fifth amendment privilege at whatever cost.[6] It may be said

6. In addition, both Kaiser and Simon, who have already given testimony on deposition may well be foreclosed from now invoking the fifth amendment in any event by reason of "waiver." E.g., Rogers *v.* United States, 340 U. S. 367, 71 S. Ct. 438, 95 L. Ed. 344 (1951); Brown *v.* Walker, 161 U. S. 591, 16 S. Ct. 644, 40 L.Ed. 819 (1896).

that though the assertion of the privilege theoretically carries no stigma and in practical effect should not, defendants' election not to take the privilege is quite understandable in the light of much current public reaction. As a matter of "common sense," many disabilities may flow from invocation of the fifth amendment. Hook, Common Sense and the Fifth Amendment (1957); see Ullmann *v.* United States, 350 U. S. 422, 430-431, 76 S. Ct. 497, 100 L.Ed. 511 (1956). See also Nelson *v.* County of Los Angeles, 362 U. S. 1, 80 S. Ct. 527, 4 L. Ed. 2d 494 (1960); Lerner *v.* Casey, 357 U. S. 468, 78 S. Ct. 1311, 2 L.Ed. 2d 1423 (1958). I see no reason why defendants should be penalized for electing to relinquish the privilege by being deprived of protection against the violation of other rights resting on an entirely different footing.

Finally, no alternative remedy appears to afford defendants adequate relief in the circumstances. This is a case where the "uncertainty surrounding the adequacy" of available remedies justifies action by the District Court retaining jurisdiction. Township of Hillsborough, Somerset County *v.* Cromwell, 326 U. S. 620, 626, 66 S. Ct. 445, 90 L.Ed. 358 (1946).

The suggestion that the prosecution should be denied access to any depositions of the defendants hereafter taken by the Trustee and that communications between the Trustee and the prosecution regarding such depositions or their subject matter should be forbidden (a suggestion strenuously resisted by the United States Attorney) is an unrealistic approach to the problem. In view of the scope and complexity of the case and the

large amount of relevant testimony and exhibits it would be virtually impossible to isolate the subject matter covered by the depositions from the volume of material to which the prosecution was legitimately entitled. Indeed, were such a direction given it might seriously handicap the prosecution in the legitimate preparation of its case as the United States Attorney has urged. These considerations point up the difficulties which are implicit in this highly unusual situation.

[19] The suggestion that the trial court might suppress the depositions is equally unrealistic and impractical. Even if a motion to suppress would lie under Rule 41(a), F. R. Cr. P. (and this is highly doubtful to say the least), it is likely that it could be granted only on the ground that the prosecution had improperly connived at the taking of the depositions. And if there was such connivance the defendants would be entitled to relief on their present application. Furthermore, once the depositions of the defendants are taken the cat is out of the bag and the major damage is done. If, as appears likely, defendants are irreparably prejudiced it may well be too late for the trial court to take corrective measures to ensure the fairness and integrity of the trial.

[20] I find therefore that there is a reasonable probability that defendants Simon, Kaiser and Fishman will suffer substantial and irreparable prejudice in their defense of the criminal charges against them if the Trustee continues to take their depositions at this time and that it is reasonably likely that such unfairness will result as threatens the integrity of these criminal proceedings.

V.

I recognize that the civil litigation brought by the Continental Trustee in the Eastern District affects the interests of the large number of public shareholders of Continental and that the reorganization of that large corporate entity and its subsidiary under Chapter X of the Bankruptcy Act is to a large degree dependent on the results of that litigation. Any prejudice to these substantial public interests which may result from delay in taking the depositions of Simon, Kaiser and Fishman or any others in these civil suits must of course be balanced against any prejudice to the criminal defendants if the depositions proceed. However, the Continental Trustee has failed to persuade me that any prejudice of substance will result if the depositions of Simon, Kaiser and Fishman are delayed for a reasonable period.

It is stated in the moving papers, and not denied, that the Trustee intends to take the depositions of some 32 persons in the course of the preparation of the civil litigations in which he is plaintiff, some twenty of whom are not partners or employees of Lybrand. The deposition of defendant Simon has already been substantially completed. Kaiser's deposition has been commenced. Fishman's is still to come.

Nothing has been shown to me indicating the necessity for any immediate examination of Fishman or the continuance of the examination of Simon and Kaiser at this stage of the civil pretrial proceedings. The civil case against Lybrand has been pending since August 1965. It appears that it still will be a long time before the depositions of the many witnesses other than Simon,

Kaiser and Fishman can be completed. No reason has been advanced why the depositions of the other witnesses and parties cannot proceed expeditiously if the examinations of the three criminal defendants are postponed for a reasonable time. The most that can be said on the facts before me is that the Trustee will be inconvenienced by a delay in examining these three defendants.

I find that when the effect of a reasonable postponement of the defendants' depositions on the civil actions pending in the Eastern District and the public interests there involved is balanced against the prejudice which may result to the defendants from the conduct of such examinations at the present time, the scales are tipped overwhelmingly in defendants' favor.

VI.

[21] It is suggested by the Continental Trustee that Judge Mishler's decision in the Eastern District civil litigation denying Kaiser's motion for a protective order under Rule 30(b), F. R. Civ. P., should control the present application. I do not agree.

Of course Judge Mishler's decision deals only with a motion of defendant Kaiser. Neither Simon nor Fishman have made any applications in the civil suits and plainly as individual criminal defendants could not be bound by any decision on a motion by another.

[22] As to Kaiser, the issues before me are different from and much broader than those passed upon by Judge Mishler. As I have previously mentioned, the question before him was whether appearance by Kaiser for examination would be oppressive because it would be in viola-

tion of his fifth amendment rights against self-incrimination. Judge Mishler held only that the fifth amendment privilege did not protect against appearance for examination but must be asserted in response to specific questions put to the witness. He denied Kaiser's motion for a protective order under Rule 30(b) on that ground.

Since then the three criminal defendants have made it clear that none of them will assert his fifth amendment privilege.

As the previous discussion has indicated, the questions posed before me on the present application are not questions relating to fifth amendment rights against self-incrimination. They concern the different rights of the defendants to a fair criminal trial under the procedures provided by the Rules of Criminal Procedure. They involve the power and the duty of the federal criminal court to protect such rights and to take such action as may be necessary to prevent unfairness in the criminal proceedings before it—unfairness that well may also have due process implications which cannot be accurately forecast at this writing.

Having found that it is reasonably probable that if these depositions are taken now essential unfairness will result which will threaten the integrity of the criminal proceedings, this court may not shirk its duty to protect the criminal process before it from that probability.

## VII.

Thus far the discussion has been concerned mainly with the depositions of the three criminal defendants. The application of the defendants seeks additional relief going

considerably beyond those three depositions. Those claims must also be disposed of.

[23] (a) Defendants ask that the Trustee be enjoined from examining any other partners or employees of the Lybrand firm which is named in the indictment as a co-conspirator. It has not been demonstrated to me that any substantial prejudice to the defendants is likely to accrue if such examinations are continued by the Trustee, in the light of the information already made available by the firm. The Trustee will not be barred from taking the depositions of any persons other than the three criminal defendants.

[24] (b) Defendants ask that the Lybrand files, now held by agreement in a conference room at the Lybrand offices and available equally to counsel for the Lybrand firm and the Trustee, should for all practical purposes be placed in the sole custody of the defendants or their counsel. These files and documents appear to have been fully available at all times to the Trustee, and indeed, to the Government. There is no reason why they should not continue to be held as they now are under presently existing arrangements.

[25] (c) Defendants urge that unless the examinations of other Lybrand partners and employees are stayed and the Lybrand files and documents are made available exclusively to them and their counsel, they will be unable properly to prepare for trial. I see no reason why this should be so. Depositions can only be taken one at a time. There should be ample time for counsel for the defendants to confer with any Lybrand partners or employees. The

Trustee is prepared to cooperate in making any documents which are needed fully available for use and study in aid of the criminal defense. The criminal defendants have ample legal manpower at their disposal. There is no likelihood that the defendants' preparation for trial will be unduly hampered by the continuation of the Trustee's examinations of Lybrand partners and employees or from continuation of the present arrangement with respect to the Lybrand documents. No injunctive relief on these grounds is justified.

VIII.

There remains the question of remedy to be afforded Simon, Kaiser and Fishman.

In fashioning such remedy it is plainly important that there be a minimum of interference with the conduct of the civil actions by the Continental Trustee.

As I have indicated, a reasonable postponement of the depositions of the individual criminal defendants does not appear to be much more than an inconvenience to the Trustee and his counsel and will not substantially affect the orderly progress of the civil actions.

Both the prosecution and the defendants have stated that they wish to try the criminal case in this court as promptly as possible. The Government estimates that it will be ready for trial by mid-February 1967. The defendants expect to be ready by early April. Given maximum efforts by both sides to complete their preparation for trial, it can be expected that the criminal trial could get under way some time between those dates, or perhaps even earlier.

[26] Taking into account all the circumstances here, the Trustee will be enjoined for a period of ninety (90) days from the date of the order to be entered on this opinion from continuing the depositions of defendants Simon and Kaiser and from taking the deposition of Fishman in the civil actions in the Eastern District. At the conclusion of that period defendants may apply for further relief with respect to such depositions on good cause shown.

Beyond this all other injunctive relief which the defendants seek is denied and any and all other restraints upon the Trustee hitherto imposed are hereby dissolved.

An order will be settled so providing on two (2) days notice.

The foregoing opinion constitutes my findings of fact and conclusions of law on this application for injunctive relief.

## APPENDIX D

## Opinion and Order of the District Court Dated March 17, 1967

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

66 Cr. 831

UNITED STATES OF AMERICA,

*Plaintiff,*

*against*

CARL SIMON, HAROLD ROTH, ROBERT KAISER and MELVIN FISHMAN,

*Defendants.*

### MEMORANDUM

BRYAN, District Judge:

On December 16, 1966 an order was entered in this criminal action enjoining Irving L. Wharton, as Trustee in Reorganization of Continental Vending Machine Corporation and Continental Apco, Inc. in a Chapter X proceeding in the United States District Court for the Eastern District of New York (the Trustee), his attorneys and agents from continuing the depositions of defendants Simon and Kaiser and from taking the deposition of defendant Fishman in two civil actions in the Eastern District entitled Wharton *v.* Lybrand, et al., 65 Civil 664, and Wharton *v.* Roth, et al., 64 Civil 946, until and including March 17, 1967. The order further pro-

ded that at the conclusion of that period the moving defendants might apply for further relief with respect to those depositions on good cause shown.

On appeal by the Trustee, the Court of Appeals for the Second Circuit, in an opinion dated March 3, 1967, reversed the injunction order of December 16, 1966, with a dissenting opinion by Judge Feinberg, and directed that "The mandate shall go down forthwith."

Thereafter the moving defendants applied to Mr. Justice Harlan for a stay of the mandate of the Court of Appeals and for a continuance of the order which had been reversed beyond its expiration date of March 17, 1967, pending an application to the Supreme Court for a writ of certiorari and if such writ were granted, until the issuance of the judgment of the Supreme Court. On March 13, 1967 Mr. Justice Harlan in a memorandum opinion made the following disposition of that application:

> "Having considered the papers on both sides, I cannot regard the issues sought to be reviewed as insubstantial. I am of the opinion, however, that continuance of the District Court's injunction order, presently expiring by its own terms on March 16, 1967 [footnote omitted] is best left to that court.
>
> "Accordingly, I dispose of this application as follows. I deny the application for a continuance of the District Court's injunction order pending certiorari, without prejudice to the petitioners promptly applying to the District Court for a continuance. I stay the execution and enforcement of the judgment entered pursuant to the mandate of

the Court of Appeals pending this court's disposition of and determination upon the petition for certiorari, on condition however that such petition is filed on or before March 23, 1967."

Mr. Justice Harlan entered an order staying the execution and enforcement of the judgment of reversal entered in this court pursuant to the mandate of the Court of Appeals pending the action of the Supreme Court on a petition for certiorari to be filed by March 23, 1967. The order further provided that if the petition for certiorari is denied the stay terminates automatically but that if certiorari is granted the stay remains in effect pending the issuance of the judgment of the Supreme Court.

In this posture of the case defendants Simon, Kaiser and Fishman move before me for a continuance of the injunction order expiring on March 17, 1967, during the pendency of their petition to the Supreme Court for a writ of certiorari and thereafter, in the event that such petition is granted, pending the issuance of judgment in the Supreme Court. Mr. Justice Harlan expressly left the issue of whether the injunction should be continued to the District Court.

The first question is what standards and principles should be applied in determining that issue. The Trustee's position on that question is as follows:

"We stand fully on the opinion of the Court of Appeals which reversed your Order of December 16, 1966 and maintain that this opinion expresses the law in this district binding upon you until reversed by some higher court. Accordingly, any decision by

you in this application inconsistent with that opinion, we believe to be inappropriate."

The moving defendants, on the other hand, contend that the standards and principles set forth in my opinion of December 12, 1966 (262 F. Supp. 64), granting the injunction order must govern.

It does not seem to me that the position taken by the Trustee can be correct. Were the standards and principles of the opinion of reversal of the Court of Appeals applied, the present application would have to be denied out of hand. The "not insubstantial" questions which the defendants seek to have reviewed by the Supreme Court by petition for writ of certiorari would become moot. The leave given to the defendants by Mr. Justice Harlan to file their petition in the Supreme Court by March 23, 1967 would be an empty gesture since there would be no questions remaining for determination by the Supreme Court. Mr. Justice Harlan's stay of the execution and enforcement of the judgment of the District Court entered on the mandate of the Court of Appeals would be meaningless.

Thus, in determining the present application I must necessarily follow the principles and standards enunciated in my prior opinion.

The moving defendants, while conceding that the factual situation which prevailed last December when the injunction order was issued has changed somewhat, urge that the basic considerations on which that order was based still prevail. These considerations are fully discussed in my opinion and need not be repeated here.

Defendants urge further that the injunction should be continued to permit them to present to the Supreme Court the questions which they seek to raise there and point out that otherwise the substantial rights which they seek to protect will be irretrievably lost.

The Trustee opposes the continuation of the injunction in any respect even under the standards and principles of the prior opinion of this court. He takes the position that the factual situation on which the injunction was granted last December has since so materially changed that the necessity for injunctive relief to protect the defendants' rights to a fair trial no longer exists. He urges further that in any event the equities in favor of the Trustee now so far outbalance the equities in favor of the criminal defendants as to require that the injunction order be dissolved.

It is true that the original expectation of the defendants that the criminal case would be tried in April or May of this year has proven overly optimistic. However, both sides agree that the criminal case is difficult and complex and it is not disputed that both the defendants and the prosecution have proceeded with due diligence. It now appears likely that the criminal case will be ready for trial immediately after the summer.

The civil cases in the Eastern District of New York are by no means ready for trial either. The Trustee says that substantially all of the numerous depositions which he must take have been completed, with the exception of those of Simon, Kaiser and Fishman. This did not appear to be so last December. The Trustee estimates that if

he is now permitted to take these depositions, which he says will take some five weeks, the principal civil case in the Eastern District will be ready for trial in August.

Yet no depositions at all have been taken by the defendants in that action and their discovery has not commenced. The Trustee apparently insists that the order of priority must be maintained and that no discovery by defendants can commence until his has been completed. Without necessarily accepting the estimate of counsel for those defendants that at least six months will be required to take the necessary depositions on their behalf and to complete discovery, it is plain that a substantial amount of testimony by deposition will have to be taken on defendants' behalf. Under these circumstances it appears unlikely that the civil action would be ready for trial appreciably before the criminal action, and it is possible that the two may be on a collision course. In such event the Trustee concedes that the trial of the criminal case should take place first.

The Trustee also contends that information already disclosed to the Government through the testimony of the criminal defendants before the Grand Jury and by memorandum of their counsel makes the protections afforded to the defendants by the injunctive order no longer necessary. But I am not persuaded that such material as has been already disclosed makes the immediate taking of the proposed depositions by the Trustee any less a threat to the fundamental fairness of the criminal trial than it was on the original application.

Acceptable alternative solutions to the problem by way of modification of the injunction order as it now stands—

for example, as suggested in Judge Feinberg's dissenting opinion, "to allow depositions with appropriate prohibitions on use of them by the Government"—not only present major practical difficulties which all the parties recognize but, as I view it, would not be permissible under the majority opinion of the Court of Appeals, which will go into full force and effect if the petition for writ of certiorari is denied. Whatever rights the criminal defendants were deemed to have under the decision of this court granting injunctive relief which they seek to have reinstated by the Supreme Court would therefore be lost.

On the other hand, if the Supreme Court should grant certiorari, the "not insubstantial" questions raised, which, as the Court of Appeals pointed out, are of first instance, will be finally resolved. Any steps necessary to afford protection to the rights of the competing interests before the court can then be taken.

It seems likely that the defendants' petition for writ of certiorari will be determined in a very few weeks. If the writ is granted no doubt the Supreme Court will give full consideration to an application for early argument and disposition of the case.

Taking all the facts and circumstances into account, I conclude that there is reasonable probability that if the injunction order expiring on March 17, 1967 is not continued in effect for at least a limited period such unfairness in the criminal trial is likely to result as to require the continued intervention of the criminal court to ensure the fair administration of criminal justice and the rules governing it.

*Opinion and Order of the District Court*
*Dated March 17, 1967*

In my view the prejudice to the defendants were the injunction order not so continued substantially outbalances any prejudice to the Trustee and the interests he represents.

Therefore, in the exercise of my discretion I grant the application of the defendants to the extent that the provisions of the injunction order of December 16, 1966, will continue pending the determination by the Supreme Court of a petition for writ of certiorari to be filed by the defendants not later than March 23, 1967. If the petition is denied the injunction order will thereupon be dissolved pursuant to the mandate of the Court of Appeals. If the petition is granted the provisions of the injunction order will continue in force and effect until the issuance of the judgment of the Supreme Court.

It is so ordered.

The foregoing memorandum constitutes my findings of fact and conclusions of law on this application.

Dated: New York, N. Y.
March 17, 1967

FREDERICK VP. BRYAN
United States District Judge

# APPENDIX E

## Constitutional Provision, Statutes and Rules Involved

### U. S. Constitution

AMENDMENT V

(Excerpted in pertinent part)

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law . . ."

### 28 U.S.C. §1651

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

### Rules of Criminal Procedure for the United States District Courts

Rule 2. **Purpose and Construction.** These Rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

Rule 57(b). PROCEDURE NOT OTHERWISE SPECIFIED. If no procedure is specifically prescribed by rule, the Court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute.